

475.

JUDGMENT—TAXPAYERS' SUCCESSFUL SUIT TO ENJOIN MISAPPLICATION OF WATERWORKS FUNDS— JUDGMENT INCLUDING ALL COSTS PAYABLE FROM GENERAL MUNICIPAL FUND.

SYLLABUS:

1. *When suit is brought by a taxpayer of a municipal corporation to enjoin the misapplication of the special fund for one of the public utilities operated by the municipal corporation and final judgment is rendered in favor of the taxpayer under the provisions of Section 4316, General Code, and such judgment includes a reasonable attorney fee, the said final judgment, as well as the costs of the municipal corporation against whom judgment is rendered, should be paid from the general fund of the corporation.*

2. *There is no authority to pay the costs, including attorney fees, which have been assessed against a municipal corporation in a taxpayer's suit, wherein an injunction is issued to enjoin the misapplication of waterworks funds, from the special fund established for such waterworks.*

COLUMBUS, OHIO, June 1, 1929.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN :—This will acknowledge receipt of your recent request for my opinion in which my attention is directed to the case of *Urner, City Auditor of Cincinnati, Ohio, vs. Alcorn*, a taxpayer, Cause No. 21533 in the Supreme Court of Ohio, wherein motion to certify the record was overruled on March 6, 1929.

This suit was originally brought in the Common Pleas Court of Hamilton County by Robert S. Alcorn, on behalf of the *City of Cincinnati vs. Deckebach, Auditor, et al.*, and was carried to the Court of Appeals on appeal. The opinion of the court in the Court of Appeals is reported in the February 11th issue of the Ohio Law Bulletin and Reporter. Thereafter Henry Urner, City Auditor of Cincinnati, was substituted in place of Deckebach and the case appears in the Supreme Court on motion to certify under the title of *Henry Urner, City Auditor, et al., vs. Alcorn, a Taxpayer*.

As before stated, the suit was brought by a taxpayer of the city of Cincinnati to enjoin the defendants, the city auditor and the city treasurer of said city, from performing their respective official duties in encumbering or depleting the waterworks fund of said city for the payment of three hundred fire hydrants. Final judgment was rendered in favor of the taxpayer, including his costs and an attorney fee of \$2,000.00.

Your specific inquiry is:

“May the court costs and the attorney fees of the taxpayer in the above case be paid from waterworks funds?”

Pertinent portions of Sections 3026 and 4316, General Code, read as follows:

Section 3026:

“On the rendition of judgment, in any cause, the costs of the party recovering, together with his debt or damages, shall be carried into his judgment. * * * .”

Section 4316:

“If the court hearing such case is satisfied that the taxpayer had good cause to believe that his allegations were well founded, or if they are sufficient in law, it shall make such order as the equity and justice of the case de-

mand. In such case the taxpayer shall be allowed his costs, and, if judgment is finally ordered in his favor, he may be allowed as part of the costs a reasonable compensation for his attorney."

By the terms of Section 5625-9, General Code, it is provided that each subdivision shall establish certain funds, among which are a general fund, a sinking fund, a bond retirement fund, a special fund for each special levy, for each bond issue, and for each public utility operated by the subdivision.

Section 5625-10, General Code, provides that all revenue from the general levy of taxes for current expenses within the fifteen mill limitation shall be paid into the general fund; and Section 5625-5, General Code, provides that the purpose and intent of the general levy of taxes for current expenses is to provide a fund for certain specified purposes, among which is "the payment of judgments."

In 1917, there was submitted to the then Attorney General a question relating to the manner of the payment of costs and attorney fees in a taxpayer's suit such as the case here under consideration. At that time, it was provided in Section 4517, General Code, that the payment of all final judgments against a municipal corporation, excepting in condemnation of property cases, should be provided for by the trustees of the sinking fund. Said Section 4517, General Code, has since been amended and the provision for the payment of final judgments against any political subdivision is now found in Section 5625-5, General Code, as above stated. In the 1917 Opinion above referred to, it was held, as stated in the syllabus:

"The costs of a taxpayer, who has recovered a final judgment in his favor under the provisions of Section 4316, G. C., and has been allowed his costs including a reasonable attorney fee, are a part of the final judgment and together with the costs of the municipal corporation, unless the latter have been previously paid by the municipality, are to be paid by the trustees of the sinking fund out of funds in their hands in accordance with the provisions of Section 4517, G. C.

There is no authority to pay the costs, including attorney fees, which have been assessed against the city in a taxpayer's suit in regard to a bond issue, out of the proceeds of said bond issue."

—Opinions of Attorney General, 1917, Vol. II, p. 1878.

Without further review of the opinion above referred to, I may state that in my opinion the principles of law, applied by the Attorney General in said opinion, are applicable here, and that the final judgment in favor of the taxpayer for costs and attorney fees in a suit of this kind should be paid in the same manner and from the same fund as are other judgments against the municipality. The treasurer and auditor of a municipality are charged with the duty of administering the special funds of the municipality, as well as the general fund, and a suit brought by a taxpayer in the interest of any of those special funds is a suit brought in the interest of the municipality.

Moreover, by the terms of Section 3959, General Code, moneys derived from the operation of a municipal waterworks are limited in their use to waterworks purposes, and while it may be said that the object of the suit in question was the preservation of the waterworks funds to the end that they should be applied only to waterworks purposes, the suit was really brought against the auditor and treasurer as officials of the municipality in the interest of the proper administration of the funds of the municipality as a whole.

I am therefore of the opinion in specific answer to your question that the final

judgment in this case, including the taxpayer's costs and his attorney fees, should be paid from the general fund of the city of Cincinnati.

Respectfully,
GILBERT BETTMAN,
Attorney General.

476.

BRIDGES—TOWNSHIP—COUNTY COMMISSIONERS MAINTAIN PRIMARILY—TRUSTEES DESIGNATE IMPROVEMENTS FINANCED FROM THEIR SHARE OF GASOLINE TAX—EXCEPTION NOTED.

SYLLABUS:

1. *It is the mandatory duty of county commissioners to maintain and keep in repair bridges and culverts on township roads. However, township trustees are authorized to expend moneys for such maintenance and repair or to co-operate with county commissioners in such undertakings if they so desire.*

2. *The discretion to determine the nature of the improvement and the part of the county system to be improved from funds which are the proceeds of the township's share of the proceeds of the two cents gasoline tax, as provided in House Bill No. 335 (Sullivan-Bostwick Act), is in the township trustees, unless such trustees see fit to relinquish this privilege to the county commissioners.*

COLUMBUS, OHIO, June 4, 1929.

HON. R. D. WILLIAMS, *Prosecuting Attorney, Athens, Ohio.*

DEAR SIR:—Acknowledgment is made of your recent communication which reads:

“A number of township trustees of this county have called upon me recently, complaining of what they feel to be an arbitrary and erroneous position taken by our county commissioners in that the county commissioners are requiring the trustees to construct all bridges in their respective townships, the original cost of which does not exceed fifty dollars. The commissioners paying the cost of constructing those bridges which cost in excess of fifty dollars. The trustees have taken the position that the commissioners should build all bridges, irrespective of cost. I have examined a number of sections of the General Code, as well as some two or three opinions rendered by your predecessors in office. I do not have an opinion of the Attorney General rendered in 1925 which, from a notation at hand, might solve my difficulty. However, I trust your office will put me right in the premises.

Certain of our township trustees are of the impression that they will shortly receive a substantial sum of money derived possibly from the gasoline tax imposed by the Sullivan Bostwick law, as well as from the state under the provisions of the Green law. This money, they understand, is to be expended on the county system of roads within their respective townships. Several questions have arisen—chief among them being:

Do the commissioners of the county or the trustees of the township determine the nature of the improvement and the part of the county system to be improved?